Miscellaneous Appeal 392 of 2006

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Against the judgment, dated 29th August, 2006, passed by the Sub Judge, Rosera, district Samastipur, in Partition Suit No. 38 of 2004

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Ram Prakash Mahto, s/o late Devan Mahto, r/o village Sahiyar Burj, P.O. Rosera, P.S. Rosera, Anchal Rosera, district Samastipur (Bihar)
.. Defendant No. 2/Appellant

Versus

1. Jibach Mahto, s/o Late Devan Mahto
2. Smt. Gita Devi, w/o late Rambilash Mahto
Both residents of village Sahiyar Burj, P.O. Rosera, P.S. Rosera, Anchal Rosera, district Samastipur (Bihar)
.. Plaintiffs/Respondents

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For the appellant .. Mr. H.K. Thakur, Adv.

For the respondents .. M/S Uma Shankar Singh no. 2 & Krishna Prasad Singh no. 2, Advs.

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P R E S E N T

THE HON'BLE MR. JUSTICE GOPAL PRASAD

Gopal Prasad, J. Heard learned counsel for the parties.

2. This Miscellaneous Appeal is directed against the order, dated 29.08.2006, passed by the Sub Judge, Rosera, Samastipur, in Partition Suit No. 38 of 2004 by which he has rejected the petition under Order 39 Rule 1 and 2 of the Civil Procedure Code for grant of temporary injunction with respect of the suit land.

3. The defendant-appellant filed a petition under Order 39 Rules 1 and 2 of the Civil Procedure Code for restraining the plaintiffs

from transferring and distributing the possession and changing the physical feature of suit property on the ground that plaintiffs have forcibly constructed a wall upon the homestead land of defendant and even constructed chajja upon the roof of the home though there is no unity of title and possession as property already partitioned and gift by Devan Mahto is out of the share of Devan Mahto and his conclusive possession.

4. The plaintiff-respondent filed objection that partition suit for partition of all immovable property as Devan Mahto was karta and there never had been any partition and gift is with regard to joint undivided family and property and Devan Mahto was karta and property purchased is from joint family fund and further plaintiffs have no motive to transfer.

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5. However, the learned lower Court after considering the case of the parties rejected the prayer for injunction on the ground that since the defendant, who has filed the injunction petition though have claimed that the suit property has been partition and is claiming only 1/4th share, but, he is asking for injunction with respect to entire suit property and, hence, neither has got a prima facie case nor balance of convenience or irreparable loss in his favour.

6. The case of the plaintiffs is that said property is joint family property and, hence, be partitioned. The case of the defendant is that the property has already been partitioned and has got 1/4th share as the partition has already taken place, but, petition for injunction filed regarding the suit property on the ground that the plaintiffs have negotiated to transfer and likely to change the physical feature and to

dispossess the defendants forcibly constructed well in suit property. From the perusal of the injunction petition, itself, it is apparent that in the injunction petition though stated to have been include the averments in written statement and though it is stated that plaintiffs 1 and 2 have sold the land of plots no. 52 and 54, but, there is no averment in written statement or injunction petition whether these plots fall in the share of the defendant. Further, though it is asserted that the plaintiffs have dug well, but, there is no mention in which part of the land the well has been dug and whether the wall dug on the land fell in the share of the defendant or not, nor there is mention that the house over which the chajja has been extended whether fell in the land allotted in share of the defendant. There is no mention at all that the land for which the injunction sought or allegation made about the executing sale deed or about the digging of well or extending the chajja in the suit land whether fell in the share of the defendant after partition by metes and bounds as claimed. There is no mention of the land which fell in his share on partition by metes and bounds and no assertion that injunction sought is with respect to land fell in share of land which was allotted to appellant by partition by metes and bounds. However, the injunction sought is not with respect to his case about the land which fell in his share, but, the injunction is with regard to the entire suit property, hence, has got neither a prima facie case nor balance of convenience in his favour nor irreparable loss and injunction can not be granted for land against his case in suit. However, the allegation in injunction petition about the negotiation and dispossession of land is quite vague

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and that has been denied by the plaintiffs in their rejoinder to the petition.

7. Having regard to the fact that the learned lower Court having well considered these aspects of the matter to hold that there is no prima facie case nor balance of convenience nor irreparable loss in favour of the defendant-appellant and, hence, I do no find any merit in this Appeal and the Miscellaneous Appeal is **dismissed**. However, the learned lower Court is directed to dispose off the case at the earliest.

(Gopal Prasad, J.)

The Patna High Court,
The 23rd day of August,
N.A.F.R./Cp:3/S.A.

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